

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

LAWRENCE FISHER,

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:

C.A. No: 12C-01-028 (RBY)

_____ **Plaintiff,**

:

:

v.

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:

**BAYHEALTH MEDICAL CENTER,
INC. d/b/a KENT GENERAL
HOSPITAL, and DR. STEPHEN
MALONE,**

:

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:

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Defendants.

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Submitted: April 15, 2013

Decided: April 24, 2013

***Upon Consideration of Defendant BayHealth Medical Center, Inc.
d/b/a Kent General Hospital Motion to Dismiss***

DENIED

ORDER

Andrew G. Ahern, III, Esq., Joseph W. Benson, P.A., Wilmington, Delaware for Plaintiff.

James E. Drnec, Esq., Balick & Balick, LLC, Wilmington, Delaware for Defendant Bayhealth Medical Center, Inc.

John A. Elzufon, Esq., and Andrea C. Rodgers, Esq., Elzufon, Austin, Tarlove & Mondell, P.A., Wilmington, Delaware for Defendant Dr. Stephen Malone.

Young, J.

Fisher v. Bayhealth Medical Center, Inc., et al.
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Together with the Order in this case, the Court has filed its decision in the case of co-defendant, Dr. Malone. The holding in that matter appears to resolve this issue as well.

Accordingly, to the extent that Plaintiff's claim against Defendant BayHealth is for vicarious liability through the actions of Defendant Malone, then Plaintiff may pursue the BayHealth claim. As in the Malone decision, that claim is limited to Defendant BayHealth's legal responsibility for Dr. Malone's performance of the incision involving Plaintiff. To the extent that Plaintiff's claim were to involve spinal surgery, then for the same reasons as explained in the Malone decision, Plaintiff's claim would be thwarted.

Further, to the extent that Plaintiff envisions any distinct claims not associated with Dr. Malone, the Affidavit of Merit does not suggest any overlapping of fields at all, since there is no indication of any other breach. Thus, no presently unspecified field of expertise exists, because no physician or hospital personnel or area of negligence was described. Since none exists, there is nothing with which the Merit Affidavit could be similarly engaged. His affidavit, therefore, is deficient as to any such other claim. This is not a matter of the identities of the BayHealth personnel, as discussed in *Zappaterrini*, it is a matter of the fields of practice.¹

CONCLUSION

To the extent that Plaintiff's claim against BayHealth is based upon the

¹ *Zappaterrini v. St. Francis Hospital, Inc.*, 2009 WL 1101618 (Del. Super. April 22, 2009).

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incision practice of Dr. Malone, Defendant BayHealth's Motion to Dismiss is **DENIED** on the grounds set forth in the Malone Motion decision filed herewith. To any other extent, Defendant's motion would be granted.

IT IS SO ORDERED._____

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
Opinion Distribution